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No. 91-2054

In the Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES DEPARTMENT OF JUSTICE, ET AL.,
PETITIONERS

v.

VINCENT JAMES LANDANO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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Respondent fails in his efforts to defend the court of appeals' holding that "detailed explanations relating to each alleged confidential source" are a prerequisite to any invocation of Exemption 7(D) of the Freedom of Information Act (FOIA), 5 U.S.C. 552(b)(7)(D). Pet. App. 27a. Respondent points to no provision of the FOIA that imposes such a requirement, nor any indication that Congress envisioned such particularized showings. In fact, the language of Exemption 7(D) (especially as amended in 1986), the background and policies of that Exemption, and this Court's past approval of categorical showings under the FOIA all demonstrate that in a case such as this, individualized proofs are unnecessary. Despite respondent's rhetoric about "evisceration" of the FOIA under this approach, the FOIA has for many years continued to serve its function of informing the public

even as federal law enforcement agencies and most federal courts have adhered to a presumption of source confidentiality in criminal investigations. By contrast, adoption of respondent's view would drastically alter the application of Exemption 7(D)—frequently making it impossible to invoke its protection, subjecting a wide range of sources to exposure, and jeopardizing the flow of vital source information to the FBI and other federal law enforcement agencies.

A.1. Respondent first tries to avoid the inference of confidentiality for the FBI's sources in this case by redefining the statutory term "confidential," imposing on it a highly restrictive meaning that has no basis in the text of the FOIA and that would render Exemption 7(D) ineffective to protect FBI sources. Specifically, respondent asserts (Br. 33, 46-47) that only "sources that desired complete anonymity and secrecy" can qualify as "confidential" under Exemption 7(D), and that assurances of confidentiality therefore can only "rarely" be given. The court of appeals correctly rejected that rigid view and properly understood the term "confidential" to embrace various degrees of confidentiality. Pet. App. 24a-25a. Sources cannot expect *total* confidentiality (in the sense of no dissemination of the information beyond the agent to whom it is given), for then the FBI itself would be unable to make use of the information. See *Dow Jones & Co.* v. *Department of Justice*, 917 F.2d 571, 579 (D.C. Cir. 1990) (Silberman, J., concurring in denial of rehearing en banc); Gov't Br. 20 n.15.

Respondent's contrary argument ignores the ordinary meaning of "confidential," which contains no such stringent limitation (see Gov't Br. 15-16), and it is wholly without support in the legislative history. That history shows that Congress was fully aware that confidentiality is the norm when the FBI obtains information from sources in a criminal investigation, and that Congress intended to protect a wide range of such sources, including "citizen volunteers" as well as "informants." See Gov't Br. 26-27, 29. The fact that some members of Congress referred to "anonymity" or "secrecy" (see Resp. Br. 33-34) proves nothing, for those terms are inherently no more absolute than "confidentiality." The FBI can maintain the "secrecy" of some aspects of a source's cooperation while revealing others, or maintain the "anonymity" of a source as regards the public at large while revealing his identity selectively, as necessary for law enforcement purposes.

Furthermore, as the First Circuit recognized in *Irons* v. *FBI*, 880 F.2d 1446, 1449-1452 (1989) (en banc), the legislative history of the 1974 FOIA amendments affirmatively supports protection for sources even when their confidentiality may be less than absolute. In rejecting the notion that subsequent testimony "waives" confidentiality under Exemption 7(D), the *Irons* court recognized that the 1974 amendments were the product of substantial give and take, and that their passage hinged on the term "confidential source," which was understood to be comprehensive in scope. Thus, "Congress intended a literal interpretation [of Exemption 7(D)], even where a literal application sweeps broadly." 880 F.2d at 1449.[1]

Respondent also errs in suggesting (Br. 34-37) that the government officials (such as then-FBI Director Webster) who urged a further revision of Exemption 7(D) in the 1980s were concerned only with the confidentiality of some ill-defined but narrow class of "tipsters" requiring absolute secrecy. In his testimony, which included numerous examples of the reluctance of sources to cooperate in light of the possibility of public disclosure under the FOIA, Director Webster spoke to the "willingness of human beings to furnish information" to the FBI gen-

[1] The First Circuit has recently also expressly followed the majority rule with respect to the presumption of confidentiality. See *Providence Journal Co.* v. *United States Dep't of the Army*, No. 92-1166 (Dec. 8, 1992), slip op. 26-28.

erally, and he included among the confidential sources needing broader protection "private citizens, businessmen and representatives of municipal and state governments." [2] As a result of such testimony by Director Webster and others over a five-year period (Gov't Br. 29-32), Congress was fully aware when it enacted the 1986 FOIA amendments of the broad range of "confidential sources" protected by Exemption 7(D), which went well beyond those demanding complete anonymity.[3]

Respondent's theory is further refuted by the fact that the 1986 amendments to Exemption 7(D) expressly include state and local law enforcement agencies among the sources that can qualify as "confidential." Such entities are fully aware that any assurances of confidentiality are inherently qualified by legal obligations, such as the requirement under *Brady* v. *Maryland*, 373 U.S. 83 (1963), to release exculpatory materials to the defendant in a criminal prosecution. The same Congress that recognized the confidentiality that typically inheres in communications between local law enforcement agencies and

[2] See *Oversight of the Administration of the Federal Freedom of Information Act: Hearings Before the Subcomm. on Intergovernmental Relations of the Senate Comm. on Governmental Affairs*, 96th Cong., 2d Sess. 460 (1980).

[3] Director Webster and other witnesses stressed the wide range of confidential sources vital to federal law enforcement efforts, describing them as "the single most important tool" and the "mainstay" of law enforcement, and pointed out that they include "private citizens and 'street' informants alike"—sources providing "background information" as well as those relating direct evidence of crimes. See *Freedom of Information Act: Hearings Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 861 (1981) (Dir. Webster) [*1981 Hearings*]; *Freedom of Information Reform Act: Hearings on S. 774 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 98th Cong., 1st Sess. 57 (1983) (AAG Rose); *id.* at 482 (Dir. Webster); *The Freedom of Information Reform Act: Hearings on S. 774 Before a Subcomm. of the House Comm. on Government Operations*, 98th Cong., 2d Sess. 805 (1984) (DAG Dinkins).

the FBI (see also J.A. 40) could not have intended the crabbed reading of "confidential" that respondent advances here.

Respondent's suggestion (Br. 10, 37 n.21, 46-47) that the mere possibility that information might be disclosed under *Brady* negates the "confidential" status of its source takes his argument to its absurd conclusion. Notwithstanding our showing that Congress has consistently sought to secure effective protection for a wide range of confidential FBI sources (Gov't Br. 24-33), respondent candidly insists (Br. 10, 47) upon an interpretation under which protection would be "impossible" to assure or could, at best, be afforded "only rarely."

2. At the same time that respondent tries to redefine the term "confidential source" in a way that would largely eliminate the protection afforded by Exemption 7(D), he argues (Br. 17) that we have "effectively *defined*" the term to include all sources in a criminal investigation. Respondent fails, however—as the court of appeals occasionally did (see Gov't Br. 22)—to distinguish between issues of definition and issues of proof. The definition of "confide[illegible]ource" is a matter on which there is wide consens[illegible]n which even the court below joined. Both the ordinary meaning of the term and the legislative history of Exemption 7(D) show that it has a broad yet concrete meaning: it applies to any person who reasonably could be found to have furnished information "in confidence," regardless of whether that finding is based on an express assurance or on "circumstances from which such an assurance could reasonably be inferred." Gov't Br. 15-16; Pet. App. 22a (quoting S. Rep. No. 1200, 93d Cong., 2d Sess. 13 (1974)). The substantive standard of confidentiality applies regardless of how it may be met in a particular case. And because any inference or presumption of confidentiality, as so defined, may be rebutted on the facts of a particular case, there is no merit to respondent's notion that

our reading of Exemption 7(D) would sweep all sources within its coverage as a matter of law.

B. 1. The remaining issue is what showing the FBI must make to carry its burden of sustaining the application of Exemption 7(D) to particular information. As we point out in our opening brief (Gov't Br. 22-24), an approach based on objective inferences is especially appropriate in this setting because, under the text of Exemption 7(D), the FBI need not demonstrate that a given record will necessarily reveal a confidential source (or, in a criminal investigation, information furnished by such a source); the text of the Exemption requires only that production of the record "could reasonably be expected" to have that result. Respondent argues (Br. 20-21, 42) that this straightforward analysis represents a "misreading" of the statutory language, but his grammatical arguments are spurious. We have never argued that the words "could reasonably be expected" modify the term "confidential source"; those words clearly modify the word "disclose," and they permit withholding even if there is uncertainty about whether the disclosure of a confidential source (or information provided by such a source) will in fact occur. There is, however, no textual basis for respondent's assertion that this phrase allows for only one type of uncertainty—*i.e.*, when it is known that an individual is a "confidential source" but uncertain whether production of a given document would reveal his identity. The situation presented by this case is likewise covered by a straightforward application of the statutory text: where, as is frequently the case, an FBI record on its face reveals the identity of a source and there is no circumstance that would negate the normal inference of confidentiality, it logically follows that production of that record "could reasonably be expected to disclose the identity of a confidential source."

Respondent also invokes the legislative history of the 1986 FOIA amendments in support of his narrowing construction of the "could reasonably be expected" language,

arguing that Congress was concerned solely with the "mosaic" problem that arises when a knowledgeable requester would be able to ascertain the identity of a source from seemingly innocuous information. See Resp. Br. 37-41. Although that example of the law enforcement concerns engendered by the FOIA was discussed during Congress's consideration of the 1986 amendments, the statute cannot properly be confined to the particular example that was used to illustrate the problem to be addressed. See *Pension Benefit Guaranty Corp.* v. *LTV Corp.*, 496 U.S. 633, 649 (1990). Moreover, the application of Exemption 7(D) we urge is fully consonant with an avowed purpose of the 1986 amendments—to ease the FBI's burden in invoking Exemption 7(D). See *Irons*, 880 F.2d at 1452; *Reporters Committee*, 489 U.S. at 756 n.9; see also *id.* at 777 n.22 ("coud reasonably be expected" language gives government "greater flexibility").[4]

2. Even if the Court were to conclude that the phrase "could reasonably be expected" does not in itself provide express textual support for a presumption or inference of confidentiality, it would not follow, as respondent suggests (Br. 14-16), that Exemption 7(D) thereby affirmatively *precludes* use of reasonable presumptions or inferences. As we have shown (Gov't Br. 38-43), this Court

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[4] Respondent also argues (Br. 40-41) that the history of the 1986 amendments reflects no intent to alter the "definition of 'a confidential source.'" As we have already shown, that argument fails to recognize that while Congress did not alter the meaning of "confidential source" in 1986, it deliberately eased the government's evidentiary burden in establishing confidentiality. See Gov't Br. 22, 32-33. Indeed, the key congressional committee report—to which respondent does not even refer—specifically tied the "could reasonably be expected" language of the amendment to the "burden of proof" borne by law enforcement agencies in invoking Exemption 7. S. Rep. No. 221, 98th Cong., 1st Sess. 23-24 (1983); see *United States Dep't of Justice* v. *Reporters Committee for Freedom of the Press*, 489 U.S. 749, 778 n.22 (1989) (pointing to Senate Report's discussion of this amendment).

has approved the use of "presumptions" in allocating evidentiary burdens in cases arising under a variety of statutes in which Congress did not expressly so provide.

Furthermore, this Court's prior FOIA decisions make clear that where a generic or "categorical" showing is logically sufficient to establish the applicability of an exemption, the FOIA imposes no requirement of individualized proofs. See Gov't Br. 23-24 & n.17. Respondent's attempts (Br. 41-43) to avoid the teaching of those cases are unavailing. First, his purported distinction between "categorical" and "universal" rules (Br. 41-42) is meaningless, because every "categorical" rule is "universal" within the defined set of circumstances to which it applies. Moreover, the categories of records for which the FBI invoked Exemption 7(D) in this case are, in respondent's words, "well-defined" (Br. 42)—just like the categories of records protected under *Reporters Committee; NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978); and *FTC* v. *Grolier Inc.*, 462 U.S. 19 (1983), on which respondent relies (Br. 41-42). See J.A. 33-41. Second, respondent errs in supposing (Br. 43) that the holding of *Reporters Committee* rested solely on "adjudicative difficulties" unique to "balancing" tests. *Reporters Committee* carefully analyzed the pertinent provisions of the FOIA and concluded that they contain no requirement of individualized proofs under any FOIA exemption, if its applicability can be demonstrated by a categorical showing. 489 U.S. at 778. The Court stressed as well the need for "workable rules" in applying the FOIA's exemptions, not simply to avoid administrative burdens, but also to ensure principled and predictable implementation of the Act. *Id.* at 779. Such considerations are not limited to "balancing" tests; one of the great flaws in any attempt to base the application of Exemption 7(D) on after-the-fact assessments of the circumstances of individual interviews is that it will " 'result in *ad hoc*—and therefore unprincipled—determinations' by the courts." Gov't Br. 37 (quoting *Dow Jones*, 917 F.2d at 577).

3. Respondent's resort to legislative history in an effort to establish that source-by-source showings are required is no more successful. Respondent makes much of the discussion during consideration of the 1974 FOIA amendments of the need for greater specificity in supporting the withholding of law enforcement records. See Resp. Br. 29-32. At that time, however, Congress was dealing with a wholly different level of specificity. Whereas the pre-1974 version of Exemption 7 provided a virtually complete exemption for all law enforcement records, the 1974 amendments imposed the new requirement that an agency invoking Exemption 7 establish that disclosure would result in a specific type of harm, corresponding to one of the new subparts of the exemption. See generally *FBI* v. *Abramson*, 456 U.S. 615, 627-628 (1982). Nothing in the 1974 legislative history indicates that Congress meant to insist that each *instance* of such specific harm be proved separately, and this Court has not read Exemption 7 to impose such a requirement. See *Reporters Committee; Robbins Tire*, 437 U.S. at 223-224.[5]

Respondent's reliance on the 1974 Conference Report's explanation that Exemption 7(D) applies "in circumstances from which such an assurance [of confidentiality] could reasonably be inferred" is particularly puzzling. See Resp. Br. 28-29 (quoting H.R. Conf. Rep. No. 1380, 93d

[5] The passage from a bar association report quoted by two Senators, on which respondent relies (Br. 26-27), reflected the overall change proposed for Exemption 7, distinguishing between generalized concerns about the "disclosure of investigative techniques *in general*" and more well-defined interests such as "the need to preserve the identity of sources of information *in particular cases*." 120 Cong. Rec. 17,035 (1974) (*Source Book II* at 338). That passage says nothing about the type of evidentiary showing that must be made in a particular case. Another snippet of legislative history on which respondent relies—Senator Kennedy's statement disapproving "blanket claim[s] of confidentiality," Resp. Br. 27 (quoting 120 Cong. Rec. 17,019 (1974))—is even further afield, because it involved the requirement that "reasonably segregable" portions of otherwise exempt records be released.

Cong., 2d Sess. 13 (1974) (*Source Book II* at 230)). That passage actually confirms that Congress recognized that an inference of confidentiality would be a proper basis for invoking Exemption 7(D); it says nothing about the showing needed to support such an inference.

Respondent's strained arguments (Br. 29-32) based on the 1974 legislative history regarding FOIA Exemption 1, 5 U.S.C. 552(b)(1), are even further removed from anything relevant to this case. The remarks he quotes concerned *in camera* inspection of classified records and a proposal for altering the standard of *judicial review* under Exemption 1 through use of a "presumption" that Executive classification decisions were correct. Congress's decision not to alter the standard of judicial review under Exemption 1[6] has nothing to do with the sort of evidentiary presumption at issue here, which would be applied by federal agencies and reviewing courts alike. This Court has recognized that the propriety of categorical or presumptive approaches to proof under the FOIA is distinct from the *de novo* standard of judicial review. See *Reporters Committee*, 489 U.S. at 756 n.9. Indeed, respondent concedes (Br. 24 n.11) that *Reporters Committee* held "that the burden of proof requirements of the FOIA do not, by themselves, mandate case-by-case analysis."[7]

[6] Nevertheless, the courts have uniformly recognized, based on further legislative history that respondent does not cite, that they must give "substantial weight" to agency classification decisions in Exemption 1 cases. See, *e.g.*, *Military Audit Project* v. *Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981) (quoting S. Rep. No. 1200, *supra*, at 12); *Krikorian* v. *Department of State*, No. 91-5028 (D.C. Cir. Jan. 29, 1993), slip op. 4.

[7] Respondent's reference (Br. 27 n.14) to congressional oversight of one agency's implementation of FOIA Exemption 4, 5 U.S.C. 552(b)(4), is completely beside the point. The quoted passage concerned the propriety of agency solicitation of express requests for confidentiality, which has nothing to do with the evidentiary issue here. In any event, the passage led to no change in Exemption 4. Furthermore, although the scope of "confidential" commercial information protected by Exemption 4 has been a matter of some dispute, that dispute has centered on court-developed standards based on the underlying policies of Exemption 4, which have no counterpart in the case law under Exemption 7(D). See generally *Critical Mass Energy Project* v. *NRC*, 975 F.2d 871 (D.C. Cir. 1992 (en banc), petition for cert. pending, No. 92-1043.

C. Although nothing in the text, history, or policies of the FOIA imposes the source-by-source proof requirement for which respondent argues, he insists (Br. 21-24, 43-48) that the presumption of confidentiality that the majority of the courts of appeals have recognized is inappropriate. Respondent fails to appreciate the practical necessity of such a presumption in order to give "meaningful reach and application" to Exemption 7(D). See *John Doe Agency* v. *John Doe Corp.*, 493 U.S. 146, 152 (1989).

1. Respondent complains (Br. 22-23) that while some presumptions are "easily rebutted," the presumption of confidentiality under Exemption 7(D) is not. However, the myriad presumptions that the law recognizes vary widely, and the manner in which a particular presumption is applied depends upon the governing substantive law and practicalities of proof. See generally 2 *McCormick on Evidence* §§ 342-344 (4th ed. 1992). The difficulties that a FOIA plaintiff may face in attempting to rebut the presumption of confidentiality (see *Dow Jones*, 917 F.2d at 577) often result from limitations on the information available to *either* party. See Gov't Br. 41 n.34. Furthermore, if an implied assurance of confidentiality indeed *is* the norm, respondent is wrong to suggest that the presumption *should* be "easily rebutted." And the very fact that the presumption is rebuttable makes this rule inherently less stringent than the truly "categorical" rule adopted in *Reporters Committee*.[8]

[8] The availability of *in camera* inspection provides a further safeguard to ensure that law enforcement agencies do not improperly

Respondent also contends (Br. 22-23, 45) that a presumption of confidentiality is inappropriate because it does not work in favor of FOIA requesters, the putative "beneficiaries of this remedial Act." The FOIA, however, is a multifaceted statute that accommodates a number of competing policies. *Abramson*, 456 U.S. at 621; *United States* v. *Weber Aircraft Corp.*, 465 U.S. 792. 803 n.23 (1984). Although the Act's general policy is, of course, to encourage disclosure, that goal is tempered by the policies underlying the exemptions; and "[i]n applying Exemption 7, the Court carefully has examined the effect that disclosure would have on the interest the exemption seeks to protect." *John Doe Agency*, 493 U.S. at 157. The legislative record on which Congress acted in 1966, 1974, and 1986 establishes that the central policy of Exemption 7(D) is to ensure the continued flow of information to the FBI and other law enforcement agencies by affording reliable protection to their confidential sources. See Gov't Br. 24-33. The presumption we urge plainly "is consistent with, and * * * supports" that policy. *Basic Inc.* v. *Levinson*, 485 U.S. 224, 245 (1988).

2. Respondent denies that "common sense and probability" support a presumption of confidentiality (Resp. Br. 45-46 (quoting *Basic Inc.*, 485 U.S. at 246)), but he fails to answer the abundant indications that confidentiality is indeed the norm. The FBI's evidentiary submission to the district court in this case (which respondent

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invoke Exemption 7(D). See, *e.g.*, *Hale* v. *United States Dep't of Justice*, 973 F.2d 894, 899-900 (10th Cir. 1992). *In camera* inspection might be appropriate, for example, where a FOIA plaintiff can articulate a ground for rebutting the presumption of confidentiality but claims to lack access to necessary evidence. In this case, the FBI repeatedly offered to allow *in camera* inspection of the entire file, even though respondent never articulated any reason to suggest that the sources providing information to the FBI in the course of the Snow murder investigation did not have the usual expectation of confidentiality. The district court declined that offer. Pet. App. 45a-46a.

did not rebut) establishes that sources "must be assured" confidentiality in order to protect the FBI's investigative capabilities, that the FBI has consistently maintained the confidentiality of source information in criminal investigations, and that there is a "traditional willingness" to assure confidentiality and a "traditional understanding" to that effect as a result. Superneau Decl. ¶¶ 48, 49, 54, 55 (J.A. 37-38, 40-41). In addition, the FBI's practice of preserving confidentiality has been recognized by the courts,[9] which have concluded that "[m]ost people would assume that the information they give to a criminal law enforcement official during a criminal investigation will be kept confidential." *Johnson* v. *United States Dep't of Justice*, 739 F.2d 1514, 1518 (10th Cir. 1984); see *Dow Jones*, 917 F.2d at 577 ("rarely—if ever—will a source not desire" confidentiality). Respondent's contrary insistence (Br. 46) that many "citizen volunteers" are indifferent to confidentiality lacks any evidentiary basis in the record and is contrary to common sense. It also is at odds with repeated congressional testimony by federal law enforcement officials, who have stressed that a public perception that the FBI can and will effectively safeguard confidentiality is crucial to the continued willingness of a wide range of citizens and organizations to provide information. See Gov't Br. 31.

Respondent's further arguments for doubting that sources normally expect confidentiality are insubstantial. His suggestion (Br. 46) that confidentiality is not implicit when sources provide "seemingly unimportant" information ignores the fact that it is frequently difficult to know, in advance, what information will prove important and what adverse consequences may ensue from disclosure of particular information. See Gov't Br. 19

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[9] See, *e.g.*, *Dow Jones*, 917 F.2d at 577; *Nadler* v. *United States Dep't of Justice*, 955 F.2d 1479, 1484 (11th Cir. 1992); *Londrigan* v. *FBI*, 722 F.2d 840, 843-844 (D.C. Cir. 1983) (quoting 1954 FBI memorandum regarding confidentiality).

n.12.[10] Next, while respondent makes much of the possibility that sources might not expect confidentiality if the person to whom they spoke did not identify himself as an FBI agent (see Resp. Br. 45-46, 48 n.28), standard FBI instructions establish that such identification is routine practice (see Gov't Br. 20 n.14), and the premise that the source is aware of the FBI agent's identity underlies the FBI's entire submission in this case about the assurances of confidentiality that can reasonably be inferred from such encounters. See J.A. 37-41. In those rare instances in which there is reason to believe that a person who provided information was unaware that he was speaking to an FBI agent—*e.g.*, where the agent was operating undercover—the reasoning upon which the FBI relies in this case would not apply.[11]

3. Because an assumption of confidentiality is indeed the norm for FBI sources, respondent's protestations (Br. 43-45) that the FBI *might*, in some cases, be capable of making a more detailed showing of the circumstances of individual sources is irrelevant. In addition, in refusing to acknowledge the difficulty of providing detailed descriptions of long-past interviews, respondent ignores numerous appellate decisions recognizing the "practical difficulty—if not impossibility" of making the sort of showing he envisions. See *Diamond* v. *FBI*, 707 F.2d 75, 78 (2d Cir. 1983), cert. denied, 465 U.S. 1004 (1984);

[10] Respondent's suggestion also ignores the legal principle that the applicability of Exemption 7(D) cannot depend upon the nature of the particular information provided. See *Shaw* v. *FBI*, 749 F.2d 58, 61 (D.C. Cir. 1984).

[11] There is no merit to the court of appeals' suggestion (Pet. App. 25a n.4) that a recitation by the FBI of its practice regarding identification of agents was necessary to support its invocation of Exemption 7(D). See Gov't Reply Br. (certiorari stage) 4. The FBI had no occasion to make such a showing in this case, because respondent never raised the point; it was raised *sua sponte* by the court of appeals. But if such a recitation were deemed necessary, it could be submitted in the event of remand.

Gov't Br. 36 & n.30 (citing additional cases). Even if more detailed information might be available in some cases, Exemption 7(D) can serve its intended purpose of ensuring the continued flow of vital law enforcement information only if its protection is categorical and predictable, and not subject to the vagaries of available proof in future litigation. Gov't Br. 31, 37.[12]

Throughout his brief, respondent avoids any clear statement of what sort of proof *would* be sufficient, in his view, to satisfy the FBI's burden of sustaining its invocation of Exemption 7(D). To the extent he suggests possible means of doing so, however, he reveals both the unmanageability of the resulting judicial inquiry and the improper narrowing of Exemption 7(D)'s scope that would result. For example, respondent refers (Br. 44) to possible evidence of express promises of (or requests for) confidentiality. Congress, however, made clear that express indicia of confidentiality are *not* necessary under Exemption 7(D), and that confidentiality may be "reasonably inferred" from the circumstances. See H.R. Conf. Rep. No. 1380, *supra*, at 13 (*Source Book II* at 230). Protection of the vast majority of the FBI's confidential sources depends upon implied assurances,[13] which are not typically capable of detailed proof after the fact.

[12] For this reason, respondent's observation that the FBI succeeded in making a more detailed showing in *Lame* v. *United States Dep't of Justice*, 767 F.2d 66 (3d Cir. 1985), is of little comfort. That opinion does not indicate the nature of the showing deemed sufficient, which was made by *in camera* declarations. It bears emphasis, moreover, that *Lame* was an anomaly, and that, for more than a decade, the FBI has consistently relied upon the majority rule that has upheld its invocation of Exemption 7(D) based on a presumption of confidentiality. Adoption of the rule of *Lame*, by which the panel below deemed itself bound, would represent a dramatic departure from prevailing practice under Exemption 7(D), would inescapably leave the identities of many existing sources unprotected, and would greatly reduce the Exemption's efficacy in protecting confidential sources generally.

[13] As one court of appeals has recently noted, the FBI has good reason to avoid express discussions of confidentiality with many

Respondent also suggests that the FBI can make a showing of "the time, place and manner of witness interviews." Resp. Br. 44. Apart from the fact that such information is not available for many interviews,[14] respondent fails to explain how it would be used or what the criteria for finding confidentiality would be. A rule calling for *ad hoc* determinations by the courts based on whatever they might read into factors such as the timing or locale of the interview would fail to provide the "concrete, workable standards" needed under the FOIA, *EPA* v. *Mink*, 410 U.S. 73, 79 (1973), and would destroy the ability of Exemption 7(D) to provide the degree of protection that the public requires.

D. A pervasive theme of respondent's brief is that a presumption of confidentiality would "eviscerate" the FOIA with respect to law enforcement agencies, providing a "blanket" exemption that would undo the 1974 FOIA amendments and relieve the FBI and other federal

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sources, because any such discussion can itself chill full cooperation by the sources. *Nadler*, 955 F.2d at 1486.

[14] See, *e.g.*, *Schmerler* v. *FBI*, 900 F.2d 333, 336 (D.C. Cir. 1990) (50-year-old records); Gov't Br. 36-37 & n.30. Respondent presumably would take the position that the FBI could remedy this problem prospectively by consistently maintaining more detailed descriptions of the circumstances of source interviews. Even if that were feasible as a practical matter, however, it would still subject the FBI's vast store of existing records on confidential sources to disclosure under a standard that could not have been anticipated—and that would destroy public trust in the FBI's ability to assure confidentiality. Cf. 5 U.S.C. 552a(j)(2) (Privacy Act's systemwide exemption for law enforcement information). Had Congress intended to impose such a requirement on law enforcement agencies, it would have done so overtly, as it has done elsewhere. For example, the Privacy Act, which Congress considered contemporaneously with the 1974 FOIA amendments, prospectively limited an exemption for investigatory materials relating to employment and similar background checks to instances of express assurances of confidentiality, while extending the exemption to instances of implied assurances for materials collected before the effective date of the Privacy Act. See 5 U.S.C. 552a(k)(5).

law enforcement agencies of their burden of proof. See Resp. Br. 7-8, 16, 21, 25, 41-42. It is true that continued adherence to the prevailing rule will protect the identities of a wide range of confidential sources, as well as the information they have conveyed. But that is as it should be, because, as the majority of lower courts have recognized, a "robust" application of Exemption 7(D) is crucial to ensuring that "confidential sources are not lost because of retaliation against sources for past disclosure or because of the sources' fear of future disclosure." *Brant Constr. Co.* v. *EPA*, 778 F.2d 1258, 1262 (7th Cir. 1985).

Respondent offers no support for his assertion (Br. 16) that under our position "virtually all of the FBI's files could be withheld," excepting only "newspaper and magazine clippings." FBI investigatory files consist of a wide array of materials, including laboratory reports and other documents regarding physical evidence, as well as correspondence and internal memoranda that may contain little or no information from sources. Any records reflecting actions taken by FBI agents themselves, as opposed to the information they receive from outside sources, is also beyond the scope of Exemption 7(D).[15] This fact shows that the FOIA retains its vitality regarding law enforcement agencies. It also reflects a sound congruence between the operation of that Exemption and the basic policy of the Act, which is to shed public light on the activities of federal agencies themselves, as opposed to those of private citizens or non-federal entities that deal with those agencies. See *Reporters Committee*, 489 U.S. at 772-775.

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[15] The proportion of materials that will fall into this category will, of course, vary among investigatory files. Although respondent complains (Br. 4) about the proportion of information withheld in this case, much information was withheld because it was received from local law enforcement agencies—a result to be expected where, as here, the subject of the investigation was a violation of state law.

Respondent's dire assessment of the impact of the presumption of confidentiality on public disclosure of the FBI's activities also is refuted by the history of substantial disclosures since the 1974 FOIA amendments were enacted. Although the FBI (with the approval of most courts) has consistently applied the approach to Exemption 7(D) that we urge here, reported decisions reflect numerous instances in which tens or even hundreds of thousands of pages of records have been released under the FOIA, providing extensive information to the public about the FBI's operations.[16] These and other cases have recognized the significance of the information released and its value in enabling the public to understand the workings of the FBI.[17] The continued importance of the

[16] See, *e.g.*, *Weisberg* v. *United States Dep't of Justice*, 848 F.2d 1265, 1266 (D.C. Cir. 1988) (release of over 60,000 documents regarding the investigation of the assassination of Dr. Martin Luther King, Jr.); *Weisberg* v. *Webster*, 749 F.2d 864, 866 (D.C. Cir. 1984) (release of over 200,000 pages of documents concerning the assassinations of Dr. King and President Kennedy); *Meeropol* v. *Meese*, 790 F.2d 942, 946 (D.C. Cir. 1986) (release of 200,000 pages of records regarding the investigation and prosecution of Julius and Ethel Rosenberg). As the latter court noted, the FBI devotes an enormous amount of personnel and other resources to the processing of FOIA requests (see 790 F.2d at 956), an endeavor that would be unnecessary if the FBI enjoyed the sort of "blanket" exemption that respondent imagines to exist under our reading of Exemption 7(D).

[17] See *Silets* v. *United States Dep't of Justice*, 945 F.2d 227, 230 (7th Cir. 1991) (en banc) ("redactions in no way hamper the public's understanding of FBI surveillance of Jimmy Hoffa"), cert. denied, 112 S. Ct. 2991 (1992); *Donovan* v. *FBI*, 806 F.2d 55, 57 (2d Cir. 1986) (FBI releases "most" of file concerning murder of American churchwomen in El Salvador).

Furthermore, the repeated grant of fee waivers for FBI FOIA requests—pursuant to 5 U.S.C. 552(a)(4)(A)(iii), under which the test is whether the release in question "is likely to contribute significantly to public understanding of the operations or activities of the government"—shows that meaningful releases are indeed taking place, notwithstanding the FBI's maintenance of source confidentiality under Exemption 7(D). See, *e.g.*, *Weisberg* v. *United*

FOIA as a source for critical assessments of the FBI's work is also apparent in reviews of a number of recent books, which have specifically credited FOIA releases as key sources for those works.[18]

In short, respondent errs in arguing that the presumption of confidentiality that most of the lower courts have recognized will result in the "evisceration" of the FOIA. At the same time, acceptance of respondent's view of Exemption 7(D) *would* eviscerate that provision by limiting its application to assurances of absolute secrecy, by imposing forbidding evidentiary burdens, and by engendering unpredictable, *ad hoc* judicial decision-making that is the antithesis of the "concrete, workable standards" that this Court has recognized are essential for the effectuation of the FOIA's policies. See *EPA* v. *Mink*, 410 U.S. at 79.

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For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed with respect to FOIA Exemption 7(D).

Respectfully submitted.

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FEBRUARY 1993

States Dep't of Justice, 848 F.2d at 1269; *Summers* v. *United States Dep't of Justice*, 925 F.2d 450, 451 (D.C. Cir. 1991). *Irons* v. *FBI*, 811 F.2d 681, 682 (1st Cir. 1987); *Rosenfeld* v. *United States*, 859 F.2d 717, 719 (9th Cir. 1988).

[18] See Herbert Mitgang, *When Academics Doubled as Intelligence Agents*, N.Y. Times, July 29, 1992, at C18 (reviewing S. Diamond, *Compromised Campus: The Collaboration of Universities with the Intelligence Community, 1945-1955* (1992)); Frank Donner, *Keeping Very Close Tabs on America's Writers*, N.Y. Times, Mar. 16, 1992, at C15 (review of N. Robins, *Alien Ink: The FBI's War on Freedom of Expression* (1992)); Herbert Mitgang, *Investigating the Chief Investigator*, N.Y. Times, Oct. 16, 1991, at C21 (review of C. Gentry, *J. Edgar Hoover: The Man and the Secrets* (1991), and A. Theoharis, ed., *From the Secret Files of J. Edgar Hoover* (1991)).

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